

Hearing of the Texas House Committee on County Affairs

**Testimony by Professor Sandra Guerra Thompson
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Good morning, my name is Professor Sandra Guerra Thompson, and I'm a law professor at the University of Houston Law Center. I previously served as a prosecutor in New York and I've been teaching as a criminal law professor for 26 years. I am also the director of the Criminal Justice Institute at the law school.

Today, I am here to speak to you about an issue I have studied and spoken about for many years. One area in which I specialized for about ten years is the area of civil asset forfeiture and criminal procedure, and part of my research involves what is usually called "racial profiling." I will limit my remarks to discretionary police stops of motorists on Texas highways and concerns about targeting minority drivers for stops, questioning, and searches.

Racial Profiling Practices around the Country

Since at least the 1990s, statistics have shown disparities in the traffic stops of motorists on highways by state police in numerous states. Lawsuits and consent decrees emerged from federal litigation against state police departments in the late 1990s and early 2000s in Illinois, New Jersey, Maryland, Florida, and several other states. The studies showed that although African-Americans and Hispanics were a relatively small percentage of the overall motorists on those highways, they were stopped, and especially searched, at extremely high rates. Searches of minority drivers were usually around 75% of all searches. They also found that those searches were less likely to find contraband than the searches of whites. I have always attributed this to the possibility that the whites searched involved stronger evidence of criminality.

In the federal cases in the early 2000s, plaintiffs presented statistical evidence, as well as other evidence including internal memoranda, training manuals, and other materials that encouraged stops and searches of minority motorists. The reason for stopping minority motorists has never appeared to be a product of pure racial animus. Rather it appears to have been motivated by a

misguided approach to drug interdiction. In several cases, the evidence was sufficient to require these state police departments to agree to remedial measures, as well as ongoing federal court monitoring in some cases.

Equal Protection Claims and Pretextual Stops under the Fourth Amendment

As the Supreme Court has made clear, “[i]f law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen’s race, without more, then a violation of the Equal Protection Clause has occurred.” In the context of a vehicle stop, proving this type of discrimination in an individual case can be difficult.

To argue that the stop violates a person’s right against unreasonable searches and seizures under the Fourth Amendment is also difficult. The Supreme Court has upheld stops of vehicles, as long as a police officer can show probable cause to stop the vehicle for a traffic violation. It makes no difference if the officer’s true intent was to stop the motorist for another reason (such as a race-based reason).

Everyone speeds, and most people violate a variety of other traffic requirements. They may fail to use the left lane only for passing, or they may switch lanes without signaling. As a matter of Fourth Amendment law, officers can usually find a valid reason to stop any motorist anytime. For this reason, it is difficult to prove either an equal protection violation based on intentional discrimination or a Fourth Amendment violation.

However, a person may argue that he or she was the victim of selective enforcement, which is a different type of equal protection claim. Selective enforcement claims frequently focus on the policies of departments, beyond the impact of particular enforcement actions on individual defendants. Statistical proof like that compiled by the *Austin Statesman* could provide a basis for a federal lawsuit against the Texas DPS alleging a violation of equal protection on the grounds of selective enforcement.

Federal district courts in other states have heard these types of actions. A spate of these lawsuits occurred in the early 2000s. From New York to Florida to California, the courts heard similar statistics. The data with regard to disparate motor vehicle stops was not good, but the real disparities were in the excessive number of searches. In this regard, the current statistical data from the DPS resemble the statistics seen in these other states since the late 1990s. More recently, we’ve seen cases in New York and Arizona:

- In New York, a federal district court in 2013 held the NYPD liable for selective enforcement based on statistics of racially disparate stops, searches, and use of force, combined with the longstanding indifference to this racial disparity.¹

¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

- A federal court held the Maricopa County Sheriff's Office liable for selective enforcement.² The court held that the plaintiffs had proved intent to discriminate based on several factors: a facially neutral policy that had been adopted "to avoid the appearance of racial profiling," that a prohibition on racial profiling was "rhetoric" intended only to protect the department in litigation, that supervisors failed to monitor for patterns of racial bias, and that supervisors failed to require adequate record keeping of stops.

With regard to possible litigation in Texas, the evidence that might be considered would certainly include the statistical proof on the disparate impact of police stops, searches, and arrests. However, it would also include:

- The apparent failure to monitor for these trends in stops and searches;
- The failure to take corrective action;
- The failure to monitor for, or correct instances of false reporting of, the race/ethnicity of people who were stopped;
- The refusal to release documents on investigations into racial profiling complaints; and
- TCOLE training programs that might cause an increase in the incidence of racial profiling.

It bears mentioning as well that the Department of Justice can file an action under 42 U.S.C. § 14141 which requires an even lesser standard of proof than a 1983 action. The state would be liable for the disparate impact of the DPS policies and practices, which these statistics clearly demonstrate. The DOJ also has broad authority to investigate a government agency before filing suit. Other states such as New Jersey and others have entered into consent decrees agreeing to change its state police practices in response to such DOJ lawsuits.

Similarly, if DPS receives federal funding, then Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, applies. Using a standard similar to 42 U.S.C. § 14141, Title VI prohibits federal-fund recipients from adopting policies that result in racial discrimination, even if unintentionally so, and allows the federal government to revoke funding.

The Different Facets of Roadside Encounters

Besides the decision whether to stop a motorist, other aspects of the encounter merit consideration, such as the length of the stop, the type of questioning done by the trooper, and the decision to search the vehicle. From my research in other states and from what I've seen here, it appears that in many of the problematic stops, the officer's true intent is to interrogate the motorist and search the vehicle for drugs. When doing research on this subject, I have also observed that officers who engage in racial profiling will often end up stopping the same motorists more than once.

From the videos published by the *Austin Statesman*, I observed:

² Melendres v. Arpaio, 989 F. Supp. 2d 822, 902-03 (D. Ariz. 2013).

- One motorist who refused to give consent to search was (illegally) told to wait so that a drug dog could be brought to sniff the exterior of the vehicle. The officer is later seen searching the trunk of the vehicle as well, despite the fact that the driver had clearly denied consent to search.
- A young woman was questioned repeatedly about where she planned to go in Dallas and whether she would stay in a motel. She had no intention of disclosing her private plans and simply refused to do so. The officer then accused her of being “disrespectful.”
- Another driver complains that it was the second time the same officer had stopped him, which the officer later confirms by stating that he remembers the driver was a fireman. (In Florida, a man complained on videotape of being stopped on that stretch of Florida highway seven times in a two-month period.)

Fortunately, none of the video footage shows any trooper making a pretextual arrest. Officers enjoy wide discretion to effectuate custodial arrests for certain traffic infractions. An officer might abuse this authority by arresting a person simply as a means to justify a search of the vehicle incident to arrest or as an inventory search upon impounding it.

Potential for Physical Confrontations during Racially-Motivated Stops

Racial profiling also increases likelihood of a physical confrontation during such discriminatory stops. The dashcam video of the stop of Sandra Bland showed her repeatedly questioning the officer as to what she had done wrong. The officer’s statement that she had changed lanes without signaling looked to me like a race-based pretextual stop. Ms. Bland thought she had a right to finish her cigarette and not put it out. She (erroneously) thought she had a right to refuse to exit the vehicle. Her frustration led the officer to react in an increasingly authoritarian way, ultimately leading to a physical confrontation. The lawsuit against the Waller County Jail settled last week for \$1.9 million dollars. The lawsuit against the Texas DPS is still pending.

These types of potentially explosive situations can lead to the use of force by officers, creating high-profile cases involving video footage and greater community unrest. We’ve seen it in other states as well:

- In New Jersey, the shooting of a group of unarmed motorists by the State Police led to a lawsuit alleging racial profiling. The State agreed to pay the four motorists, three of whom were seriously injured, \$12.9 million.
- In Minnesota, the shooting death of Philando Castille occurred when the officer reacted to his statement that he was armed when he reached for his wallet.

The recent DPS dashcam videos published by the *Austin Statesman* show frustrated motorists who recognize that they are subject to racial profiling. One woman clearly did not want to answer intrusive questions. She asks, “Is this normal?” She is asked to sit inside the patrol car for questioning. Another motorist, an attorney, knew his rights and refused consent to search—and was detained and searched anyway. He asked the trooper point-blank, “Are you doing this just because I’m black.” Another man expressed frustration at being stopped more

than once by the same officer. A fourth man, told the troopers he was a city councilman, a fact which they confirmed by phoning the City of South Houston's City Hall. They nonetheless searched his person and his work truck because it looked too clean and freshly painted. Fortunately, none of these incidents turned into physical altercations, but the potential is high, especially in a state where people have broad rights to carry weapons.

Reforms to Prevent Racial Profiling in the Future

The legislature might consider many possible reforms:

- Implement an “early warning” system to detect officers who appear to be targeting minorities for traffic stops. These systems can track the number of searches in relation to the frequency with which the officer's searches result in the discovery of contraband.
- Disallow arrests for Class C non-jailable offenses.
- Prohibit consent searches of vehicles and instead require probable cause for all vehicle searches.
- If consent searches are allowed, then officers should be required to notify motorists that they may refuse consent and proceed on their way. If a motorist chooses to give informed consent, the driver's consent should be documented in a signed statement.
- Officers could be required to notify their supervisors at the beginning of a traffic stop about the justification for the stop before any questioning the motorist.
- The legislature could convene data experts to re-evaluate the data elements collected in Texas' racial profiling law and require all departments to report the full panoply of data.
- Improve data collection to require every department engaging in traffic enforcement to gather apples-to-apples contraband hit-rate data such as that compiled by *The Austin Statesman*.
- Provide financial support for more police cameras: dashcams and bodycams.

A Personal Note Regarding Racial Profiling

On a personal note, I wanted to thank the committee for examining this issue. In the early 2000s, my father, Alfredo Guerra, was stopped by a DPS Trooper in a manner that had all the earmarks of racial profiling. I had recently given a talk on the subject that I mentioned to my dad, and he told me about his encounter.

He was driving in a late-model American car with Texas plates going north on Highway 35 between Laredo and San Antonio. My dad is a fourth-generation American (actually his ancestors settled the area near Laredo before it was part of the U.S.). He is an Air Force veteran and retired public school teacher. He looks every inch the Mexican-American that he is, his jet-black hair sporting the same slicked-back pompadour he's worn since his high school days in the 50s. This is an American-born patriot who casts an informed ballot in every election, pays his share of taxes, has no criminal record, has perfect credit, and does his jury duty. He even drives the speed limit, which I believe was probably viewed as suspicious by the

trooper. (There are federal court cases that reject a motorist's driving below the speed limit as reasonable suspicion of some hidden criminality.) Here's what happened:

The trooper passed him on the highway, with the trooper going south and my dad going north. My dad noticed him when he veered off the highway and across the grassy median to make a U-turn, fishtailing as he pulled onto the northbound side of 35. At a high rate of speed, he drove up behind my dad who then got nervous, not knowing whether he should move over to let the Trooper pass or stay in his lane. Dad weaved his car back and forth, and at that point the trooper turned on his lights and siren. He told my dad that he was stopping him for weaving into the other lane. My father told him that he only drove that way because the trooper's driving had scared him. After running his driver's license, the trooper let him go. My father did not seem resentful. He has faith that law enforcement officers are trying to keep us all safe, as do I.

But I was angry. This is a topic that I have studied as an academic, but we never think things like this will happen to one of us. Watching the videos presented by the *Austin Statesman*, I relived the anger I felt all those years ago. Upon further reflection, however, I realized that it could have been much worse for him. The people in those videos, like my father, seem like respectable, law-abiding citizens—a city councilman, a fireman, a lawyer, and a well-spoken young woman. Yet they were pulled over with sirens and lights, detained, made to step out of their vehicles, and questioned in a manner that suggested there were reasons to suspect them of criminality. A drug dog was brought, and searches were conducted. In Sandra Bland's case, she was arrested and ultimately took her own life in jail.

I can only imagine my father's humiliation if he had been made to stand on the side of the highway while a law enforcement officer searched his vehicle. Like all Laredoans, my family cannot walk into a restaurant or grocery store in Laredo without running into people we know. And Laredoans drive to San Antonio all the time. This stretch of the highway 35 is crowded with two main groups—commercial trucks and law-abiding Laredoans going to and from San Antonio. They go on business, for medical appointments, to catch a flight, for social events, or for shopping. I'm sure this is true on all parts of our state's highways. People drive the highways near their homes, *as do their friends and neighbors*. My father would have been utterly humiliated and embarrassed to be treated like a criminal on the side of the highway like the people in those videos, knowing that he was likely to be recognized by a passing motorist. The knowledge that this treatment was likely due to his ethnicity would have simply added to the humiliation. And what if this treatment had caused him to miss a flight or a business appointment?

There are real costs borne by motorists who are stopped and detained illegally: reputational and emotional costs, as well as the costs from unnecessary delays. The people in these videos surely felt this indignity, and I am quite sure they didn't deserve to be treated like common criminals.